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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

YESHIVA UNIVERSITY

Respondent.

No. 78-997

YESHIVA UNIVERSITY FACULTY ASSOCIATION

Petitioner,

v.

YESHIVA UNIVERSITY

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of the National Education Association, Amicus Curiae.

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INTEREST OF AMICUS CURIAE

All parties have consented to the filing of this brief.

The National Education Association of the United States (NEA) is an organization comprised of more than 1.7 million professional educators. Founded in 1857, it was granted a corporate charter by special act of Congress in 1906. Its

purpose is to improve the character and advance the interests of the teaching profession and to promote the cause of education in the United States. Since the early 1960s, state and local education associations affiliated with NEA have been pressing for the establishment of collective bargaining relationships in elementary and secondary school districts, junior and four-year colleges, and universities throughout the United States. NEA has been a prime mover in the enactment of numerous state statutes providing for such bargaining in publicly funded educational institutions.

Over 11,450 local faculty associations, 800 of which are in post-secondary education, are affiliated with NEA. Approximately 3,500 of these faculty associations, about 300 at the college and university level, are engaged in collective bargaining, representing nearly two million teachers.

The Court below held that when university management gives its faculty substantial influence over decisions regarding hiring, compensation, and promotion, as well as academic standards, the entire faculty loses its right to participate in collective bargaining under the National Labor Relations Act.

Since the NLRA does not apply to public employment in the states, this decision has no direct applicability to publicly funded educational institutions. However, most courts and administrative agencies which interpret and apply state public sector collective bargaining statutes are influenced by decisions interpreting and applying the NLRA.

Accordingly, affirmance of the decision below would have an impact on public as well as private colleges and universities where faculty influence in management decision-making is commonplace. Furthermore, affirmance would have a disquieting effect on elementary and secondary school systems where faculty involvement in determinations regarding faculty status and academic standards, while not as prevalent as in higher education, is not uncommon.

QUESTION PRESENTED

Are faculty members who participate in decision-making regarding the hiring, compensation, and promotion of the faculty and the academic standards of the university managerial or supervisory employees excluded from the protection of the National Labor Relations Act?

STATEMENT

The line authority structure of a university or college is not significantly different from that which operates in other kinds of enterprises. The authority to make managerial and supervisory decisions is vested by a governing board in an administrative hierarchy — the president, the vice-presidents, the bursar and registrar, the deans and directors—in descending order of authority and responsibility. Each is accountable to the next highest level of the hierarchy for the way in which he exercises the power delegated from above.

What *is* different (where it exists, as it does at Yeshiva University) is a governance structure of councils, committees, and assemblies which parallels (but is not part of) the management structure, and which exists for the purpose of eliciting faculty advice with respect to a wide range of matters—what is taught, by whom, the number of teaching hours required, appointments, compensation, promotions, and tenure status of faculty, curriculum, admissions and graduation requirements, and other academic standards. At Yeshiva University management usually follows the faculty's advice on these matters.[1]

The full-time faculty of Yeshiva University, in an election supervised by the National Labor Relations Board, elected

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[1] The management structure of Yeshiva University and the major components of the governance network for obtaining faculty input on matters concerning faculty status and academic standards are set forth in detail in the petition of the National Labor Relations Board for a writ of certiorari. (pp. 2-13).

the Yeshiva University Faculty Association as their collective bargaining representative by a substantial margin, thereby expressing in a clear and unmistakable way their dissatisfaction with their terms and conditions of employment. The management of the University refused to bargain on the ground that all faculty members, by reason of their group participation in governance, are supervisory or managerial personnel and outside the scope of the National Labor Relations Act.

The NLRB disagreed and ordered the University to recognize and bargain with the Association. The Court of Appeals refused to enforce the Board's order for the reason that the faculty "are, in effect, substantially and pervasively operating the enterprise", *NLRB* v. *Yeshiva University,* 582 F.2d 686, 698 (2d Cir. 1978), and are not, therefore, entitled to enjoy the rights of employees under the Act.

ARGUMENT

I. GOVERNANCE MECHANISMS AND PROCEDURES HAVE NO BEARING ON THE QUESTION OF WHETHER FACULTY MEMBERS AS A GROUP CONSTITUTE AN APPROPRIATE BARGAINING UNIT UNDER THE NLRA.

A. Governance systems do not vest supervisory or managerial *authority* in the faculty.

Governance systems exist for two reasons. Teachers are the "very core" of an educational system; their opinions on matters involving the operation of an educational program are critical if a managing board is to avoid impairment of its "ability to govern." *City of Madison Joint School District No. 8* v. *Wisc. Employment Rel. Bd.,* 429 U.S. 167, 177 (1976). Accordingly, a college or university management may establish a governance system because it thinks that systematic elicitation of faculty opinion on matters within the sphere of their professional competence is a sensible way to run an educational institution.

Governance systems have another function. They tend to ease tensions between management and the faculty and to improve morale. By contrast to lawyers and medical doctors who are traditionally self-employed and deal directly with their clients, establish their own criteria for admission to their professions, and enforce their own standards of good practice, professors generally attain and preserve their professional status on the basis of admission and practice standards established by colleges and universities. This is so because professors normally can serve their clientele only through an institutional intermediary. While the intrinsic aspects of teaching and research afford members of the profession greater discretion than most workers enjoy, a faculty member nevertheless is in a position where any effort to achieve a high degree of self-regulation as a professional is limited by his coincidental status as an employee. American Association for Higher Education (National Education Association), *Faculty Participation in Academic Governance, Report of the AAHE Task Force,* p. 21 (1967) (Hereinafter *AAHE Report*). These circumstances create fundamental tension between the faculty member and the university or college administration, springing from the dual role of the teacher who is at once a member of a profession and an employee. A governance system is an instrument of reconciliation which eases this tension by accommodating the aspirations of the faculty to be heard on matters of professional concern with the responsibilities of institutional management to make final decisions.

Governance procedures may come into being by reason of custom or practice or (as at Yeshiva University) by employer action through promulgation of a faculty handbook or similar document. They may also be created or legitimated by the provisions of a collective bargaining agreement. H. Mason, "Faculty Unionism and University Governance," *New Directions in Higher Education,* Volume II, No. 1, Spring 1974 at 6. The Appendix to the brief of the American Association of University Professors in support of the petition for a writ of certiorari sets forth a number

of such provisions in agreements between colleges and universities and faculty associations. Many affiliates of NEA are also party to agreements which provide for governance procedures. For example, the contract between the Board of Trustees of the University of Massachusetts and the Massachusetts Society of Professors gives the faculty primary responsibility for initiating personnel recommendations through departmental and college committees and for exercising primary responsibility in academic matters (*e.g.*, curriculum, subject matter, methods of instruction) through appropriate mechanisms maintained by management for eliciting faculty advice.[2]

The extent to which management follows faculty advice which flows through governance procedures ranges on an influence continuum from negligible (administrative primacy) at some institutions to substantial (faculty primacy) at others, such as Yeshiva University. The degree of faculty impact on management decisions may vary from issue to issue. For example, administrative primacy may operate with respect to a decision to raise tuition, while faculty primacy operates with respect to course content and teaching techniques. The position of a college or university on the continuum of faculty influence as to any given issue is determined by management, in the absence of an enforceable agreement. *AAHE Report*, pp. 14-18.

As the AAUP's Appendix, *supra*, demonstrates, the faculty's "authority" in governance systems as to most issues is limited to advising, proposing, recommending, developing, consulting, overseeing, evaluating, or channeling. Rarely if ever does the faculty's authority extend to "deciding" except as to a handful of issues within the clear ambit of professional discretion such as course content, textbook selection, and evaluation of student performance.

[2] The full text of this agreement is available from the Research Studies Unit, National Education Association, 1201 16th St., N.W., Washington, D.C. 20036.

The fundamental error of the Court below lies in its conclusion that the fact that Yeshiva University management usually follows the recommendations of the faculty means that they are, as a group, managerial or supervisory personnel. The court relied on Section 2(11) of the Act, 29 U.S.C. § 152(11) (1976), which includes as a supervisor employees who have the power "effectively to recommend."

The correct analysis of the quoted language and its meaning within the context of Section 2(11) is found in the NLRB's opinion in *Adelphi University and Adelphi University Chapter, AAUP*, 195 N.L.R.B. 639 (1972).

At issue in *Adelphi* was the question of the status of faculty members of the personnel and grievance committees. The former made recommendations to management with respect to decisions involving hiring, promotions, and the acquisition of tenure; the latter dealt with grievances involving tenure and promotion questions. The evidence showed that the administration almost always followed the recommendations of the two committees.

However, the Board was not misled by this fact. It refused to find that management acceptance of the collective judgments of a faculty group, generated by its independent consideration of the issues, amounts to an *a posteriori* investiture of management authority. A genuine vesting of authority in a faculty, acting as a group, would tend "to confound us," said the Board. 195 N.L.R.B. at 648. But there was no genuine vesting in *Adelphi* or in the earlier case of *C. W. Post Center of Long Island University and United Federation of College Teachers*, 189 N.L.R.B. 904 (1971), involving the status of the *entire faculty* as participants in a governance system. Nor is there vesting in the case here.

The collective judgment of a faculty on a matter of faculty status or academic standards, whether reached in a committee, a council, or an assembly, is not an exercise of authority to supervise or manage. It is, rather, an expression of consensus on a subject within the scope of faculty concern

and expertise as members of the professor profession. W. Oberer, "Faculty Participation in Academic Decision Making: As to What Issues, By What Persons, Using What Means of Persuasion?" *Employment Relations in Higher Education*, Phi Delta Kappa, Bloomington, Ill., pp. 132, 148 (1969). What happens to the faculty's judgment—whether it is accepted, rejected, or modified—remains in the hands of management.

B. Both Section 2(11) of the NLRA defining the supervisory exclusion and *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), enunciating the standard for determining the identity of managerial employees require a finding of *individual* supervisory or managerial activity.

Section 2(11) requires an analysis of the authority of an "individual." Group activity does not make an employee a supervisor within the meaning of this language. This has consistently been the position of the N.L.R.B. *C. W. Post Center*, 189 N.L.R.B. 904 (1971); *Adelphi University*, 195 N.L.R.B. 639 (1972); *Northwestern University*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); and *Fordham University*, 193 N.L.R.B. 134 (1971).

The Court below criticized this position on the ground that the "Board's rationale is not adequately explained." 582 F.2d at 698. But the rationale needs no explanation, first because the statutory language is clear, and second because it is axiomatic that an essential characteristic of a supervisor is personal, individual accountability to his immediate supervisor for performance of his supervisory duties. Thus, a dean or other administrative officer is subject to removal if he makes decisions which are regarded by his superior in the management hierarchy as mistaken.

By contrast, faculty members who make recommendations on faculty status and academic standards are not accountable to management. A professor's eligibility to participate in governance does not depend upon management's evaluation of the quality of his judgments (if indeed it even knows

what they are since they are merged in the collective opinion). Similarly a professor's status and progress as a faculty member are not affected by management's evaluation of his performance in the governance system. If he is accountable at all, it is to his professional peer group.

The Court below asserted that its doubt about the soundness of the Board's interpretation of Section 2(11) need not be reached because there is no such restriction in the concept of "managerial employees." 582 F.2d at 699. It held that policies created by a group as well as those developed by an individual are covered by the test of *Bell Aerospace*, which excludes from the Act employees "who formulate and effectuate management policies by expressing and making operative the decisions of the employer." 416 U.S. at 288.

In reaching this conclusion the Court erred. It eschewed an examination of the duties, job relationships, and relationship to management of individual faculty members; it looked, instead, to the role of the faculty as a collectivity and found that *all* faculty should be denied the rights of the NLRA.

This holding is contrary to the principle of *Bell Aerospace, supra*, which requires an analysis of individual, not group, activity. In *Bell Aerospace* the issue was whether the buyers for the company were managerial employees. This Court held that the decision as to whether particular employees are managerial is for the Board to make after examining "particular . . . employees' actual job responsibilities, authority and relationship to management." 416 U.S. at 290, n. 19. On remand the Board examined the duties of the buyers, the discretion they exercised in making purchases, the benefits they received and their relationship to their supervisors, *Bell Aerospace and International Union U.A.A.A.I.W.A.*, 219 N.L.R.B. 384, 386 (1975). Finding that each member of the group had the same attributes, the Board held that none of them was managerial. Subsequent decisions have turned on an analysis of the functions of individual employees. *NLRB* v. *Wentworth Insti-*

tute, 515 F.2d 550, 557 (1st Cir. 1975); *NLRB* v. *Mercy College,* 536 F.2d 544 (2d Cir. 1976).

To exclude all full-time faculty members as managerial solely because of their membership in a group, without any findings as to individual attributes, is contrary to this settled principle. Moreover, it seems anomalous to deny the rights of the NLRB to 1200 faculty members on the basis of class attributes when Section 2(3), 29 U.S.C. § 152(3) (1976), of the Act contemplates only the exclusion of *individuals* employed in specified categories.

C. Faculty participants in governance do not function "in the interest of the employer" nor do they formulate, determine, and effectuate "employer policies"; thus, they are neither supervisors under Section 2(11) of the NLRA nor managerial personnel under *Bell Aerospace.*

A governance system is designed to operate as an instrument of reconciliation. Faculty members who make recommendations regarding faculty status and academic standards are motivated by the interests of the profession, interests which are independent of those of management. The judgments which they reach reflect the concerns of the faculty in regard to who is admitted to the profession, who meets the standards of good practice, what is taught, how to measure student performance, etc. These concerns are set against the responsibilities of management to answer to consumer-users and/or funders of the college or university for institutional performance. Conflicts on these matters between the faculty and management may arise from many sources, such as disparate views over fiscal allocations between experienced and inexperienced teachers, over programmatic priorities (*e.g.*, research versus teaching), or over the response to external interest groups. The fact that the governance system may succeed in avoiding some of these potential conflicts (as it presumably does at Yeshiva University) does not mean that the faculty is motivated by the same interests as management.

The Court below asserted that these conclusory statements are negated by the record which establishes that Yeshiva University management "so rarely interfered in the faculty decisions . . . that the interests of the faculty and of the University were almost always co-extensive" 582 F.2d at 700. What the Court overlooked is that this was management's choice. If the faculty asserts a judgment on a matter looking to its interest as a professional group and management accepts that judgment, it does not follow that the faculty has lost its independence or compromised its opinion out of concern for management.

Since faculty members are accountable only to themselves and to their colleagues for their governance judgments, the danger of divided loyalty underlying the exclusion of managerial and supervisory employees from the Act is not brought into play by permitting faculty to exercise the right to bargain collectively.

It is true, as the Court of Appeals said, that most university faculties enjoy a state of independence and influence on institutional policy which is "entirely unknown among the professionals in private industry." 582 F.2d at 698. But independence is a part of the exercise of discretionary judgment by professional employees under Section 2(12) of the NLRA, 29 U.S.C. § 152 (12) (1976), and *influence* on policy is not to be equated with authority to formulate, determine, or implement it.

II. AFFIRMANCE OF THE COURT OF APPEALS DECISION WILL HAVE SERIOUS ADVERSE PRACTICAL CONSEQUENCES IN THE PUBLIC AS WELL AS THE PRIVATE SECTOR AND IN ELEMENTARY AND SECONDARY EDUCATION AS WELL AS HIGHER EDUCATION.

State courts and administrative agencies are profoundly influenced in their interpretations of state public employment bargaining statutes by decisions involving the NLRA. See, for example, *Detroit Police Officers Union* v. *City of Detroit,* 391 Mich. 44, 214 N.W.2d 803 (1974) ("[I]t is

probably safe to assume that the Michigan Legislature intentionally adopted § 15 [of the public sector bargaining laws] in the form that it did with the expectation that MERC and the Michigan courts would rely on the legal precedents developed under the NLRA . . .''). H. Edwards, "The Emerging Duty to Bargain in the Public Sector," 71 *Mich.L.Rev.* 885, 895 (1973). See also, *Aberdeen Education Association* v. *Aberdeen Board of Education*, 88 S.D. 127, 215 N.W.2d 837 (1974); *National Education Association of Shawnee Mission* v. *Board of Education*, 212 Kan. 741, 512 P.2d 426 (1973); *Pa. Labor Rel. Bd.* v. *State College Area School Dist.*, 461 Pa. 494, 337 A.2d 262 (1975).

Accordingly, if the decision below stands, it will have an impact, not only on the private colleges and universities to which the NLRA applies, but also on public colleges and universities whose labor relations are governed by state public employment bargaining statutes. Collective bargaining for faculty will be threatened in all 633 colleges and universities where it now exists if there is a procedure pursuant to which management receives, weighs, and takes into account faculty opinions with respect to academic status and standards.[3] The degree of the threat will depend upon management's unilateral decision with respect to the placement of the procedure on the continuum of faculty influence in decision-making. Thus, a college or university management may choose to move from the administrative primacy zone to the faculty primacy zone with respect to enough issues to make the doctrine enunciated by the Court below operative and justify a refusal to bargain.

Furthermore, the managements of universities and colleges that do not have faculty collective bargaining (about 2500 potential bargaining units) will have the option of preventing its establishment by creating governance pro-

[3] This total includes bargaining units represented by NEA, the American Association of University Professors, and the American Federation of Teachers.

cedures and following faculty advice with respect to enough issues with sufficient frequency to bring the principle of the decision below into play.

In sum, college and university managements will have the power, not only to devitalize ongoing relationships, but also to prevent faculty members from claiming and exercising rights under the labor relations laws.

Affirmance of the decision below will also have an adverse impact on elementary and secondary school systems where faculty influence on management decision-making, while not as wide-spread as in higher education, is not unusual. See McDonnell and Pascal, *Organized Teachers in American Schools*, Rand Corp. (1979). See also Wollett, "The Coming Revolution in Public School Management," 67 *Mich.L.Rev.* 1017 (1969).

For example, the collective bargaining agreement between the Broward County Classroom Teachers Association, Inc. and the School Board of Broward County (Florida), a large school system, provides for teacher nomination of department chairpersons, for chairpersons to make recommendations to the administration concerning curriculum, course objectives, student performance criteria for student progression, evaluation procedures, and standards for course evaluation in terms of quality, effectiveness, and efficiency, and for teacher involvement in evaluating in-service training needs, developing teacher training programs, and facilitating techniques for evaluating teacher competence.

The collective bargaining agreement between the Columbus Education Association and the Columbus Board of Education (Ohio), a middle-size school district, provides for the election of department chairpersons by the faculty, and the participation by teachers through an elaborate structure of committees and councils in decision-making with respect to the policies and programs of each elementary and secondary school, staff development, standards for instructional materials, curriculum, modular scheduling, course offerings and

team teaching, textbook selection, and educational programing.

Typical of small school districts are contract provisions which call for faculty input in the evaluation of teacher performance. See, *e.g.*, Kodiak Island Borough School District and Kodiak Borough Education Association.[4]

Finally, the task of the NLRB in administering the federal labor act will become inordinately complex if the decision of the Court below is affirmed. Whether the Board will validate a collective bargaining relationship by directing an employer to bargain will depend upon two variables: (1) The subjects which management submits to the judgment of the faculty; (2) the frequency with which management accepts faculty advice on those subjects. Furthermore, the facts at a given college or university may change from year to year or even from month to month depending upon the style of management which is currently in vogue. The rights under a statute, particularly one infused with public concern, should not depend upon such temporal permutations.

[4] The full texts of these agreements are available from the Research Studies Unit, National Education Association, 1201 16th St., N.W., Washington, D.C. 20036.

CONCLUSION

On the basis of the foregoing analysis, we respectfully urge this Court to find that on the facts of this case the full-time faculty of Yeshiva University are neither supervisors nor managerial personnel and are entitled to enjoy the rights of the National Labor Relations Act. Accordingly, we urge that the decision of the Court of Appeals be reversed.

May 4, 1979.

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